STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals

PRESERVE THE DUNES, INC.,

Plaintiff-Appellee,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY and TECHNISAND, INC.,

Defendants-Appellant.

Supreme Court Docket Nos. 122611, 122612
Court of Appeals No. 231728
Berrien Circuit No. 98-003789-CE

Thomas R. Fette, (P13396)
Attorney for Preserve The Dunes, Inc.
TAGLIA FETTE DUMKE & WHITE P.C.
720 State Street, P.O. Box 890
St. Joseph, MI 49085-1356
(269) 983-0755

Jeffrey K. Haynes (P25410)
Co-Counsel for Preserve The Dunes, Inc.
BEIER HOWLETT P.C.
200 East Long Lake Road, Suite 110
Bloomfield Hills, MI 48304-2361
(248) 645-9400

F. R. Damm (P12462)
Peter D. Holmes (P41000)
Paul C. Smith (P55608)
Attorneys for Michigan Manufacturers Association
CLARK HILL, PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

James R. Piggush (P29221)
S. Peter Manning (P45719)
Attorneys for MDEQ
Assistant Attorney General
Natural Resources Division
P.O. Box 30217
Lansing, MI 48913-7717
(517) 373-7540

James H. Geary (P13892)
Susan E. Padley (P42526)
Patrick M. McCarthy (P49100)
Cara J. Edwards Heflin (P61946)
Attorneys for TechniSand
HOWARD & HOWARD ATTORNEYS, PC
100 Portage Street, Suite 200
Kalamazoo, MI 49007-4802
(269) 382-9707

BRIEF OF AMICUS CURIAE MICHIGAN MANUFACTURERS ASSOCIATION

CLARK HILL PLC
F.R. Damm (P12462)
Peter D. Holmes (P41000)
Paul C. Smith (P55608)
Attorneys for Amicus Curiae Michigan Manufacturers Association
500 Woodward Ave., Ste. 3500
Detroit, MI 48226

Date: May 19, 2003

STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals

PRESERVE THE DUNES, INC.,

Plaintiff-Appellee,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY and TECHNISAND, INC.,

Defendants-Appellant.

Supreme Court Docket Nos. 122611, 122612
Court of Appeals No. 231728
Berrien Circuit No. 98-003789-CE

Thomas R. Fette, (P13396)
Attorney for Preserve The Dunes, Inc.
TAGLIA FETTE DUMKE & WHITE P.C.
720 State Street, P.O. Box 890
St. Joseph, MI 49085-1356
(269) 983-0755

Jeffrey K. Haynes (P25410)
Co-Counsel for Preserve The Dunes, Inc.
BEIER HOWLETT P.C.
200 East Long Lake Road, Suite 110
Bloomfield Hills, MI 48304-2361
(248) 645-9400

F. R. Damm (P12462)
Peter D. Holmes (P41000)
Paul C. Smith (P55608)
Attorneys for Michigan Manufacturers Association
CLARK HILL, PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

James R. Piggush (P29221)
S. Peter Manning (P45719)
Attorneys for MDEQ
Assistant Attorney General
Natural Resources Division
P.O. Box 30217
Lansing, MI 48913-7717
(517) 373-7540

James H. Geary (P13892)
Susan E. Padley (P42526)
Patrick M. McCarthy (P49100)
Cara J. Edwards Heflin (P61946)
Attorneys for TechniSand
HOWARD & HOWARD ATTORNEYS, PC
100 Portage Street, Suite 200
Kalamazoo, MI 49007-4802
(269) 382-9707

BRIEF OF AMICUS CURIAE MICHIGAN MANUFACTURERS ASSOCIATION

CLARK HILL PLC
F.R. Damm (P12462)
Peter D. Holmes (P41000)
Paul C. Smith (P55608)
Attorneys for Amicus Curiae Michigan Manufacturers Association
500 Woodward Ave., Ste. 3500
Detroit, MI 48226

Date: May 19, 2003

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE QUESTIONS INVOLVED

I. The Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq.*, provides a statutory vehicle by which persons may seek to enjoin conduct that is likely to result in the pollution, impairment, or destruction of natural resources. In this case, the Court of Appeals concluded that the plaintiff, Preserve the Dunes, Inc. ("Preserve the Dunes") was entitled to summary disposition of its MEPA claim based on a finding that defendant Technisand, Inc. ("Technisand") failed to qualify for a sand dune mining permit under a specific provision of the Sand Dune Mining Act, MCL 324.63701 *et seq.* ("SDMA") that is unrelated to the question whether Technisand's conduct would be likely to pollute, impair, or destroy natural resources. Did the Court of Appeals err in concluding that MEPA provided a basis for revoking the permit on this ground?

The Court of Appeals said No.

Amicus curiae, Michigan Manufacturer's Association ("MMA"), says Yes.

II. Subsection 1705(1) of MEPA provides a statutory vehicle by which a person may intervene as a party in an administrative proceeding. If Preserve the Dunes had intervened in Technisand's permit application proceeding, it would have had a limited time within which to take a direct appeal from an adverse decision. To the extent Preserve the Dunes seeks, collaterally, to invalidate Technisand's sand dune mining permit based on Technisand's alleged failure to satisfy the requirements of the permit process, is this challenge time barred?

The Court of Appeals said No.

Amicus curiae, MMA, says Yes.

STATEMENT OF FACTS

MMA relies on the statement of facts sections set forth in defendants-appellants' briefs on appeal.

ARGUMENT

A. *Introduction*

MEPA provides a statutory vehicle by which citizens may enjoin conduct that is likely to pollute, impair, or destroy natural resources. In this case, the Court of Appeals allowed Preserve the Dunes to use MEPA to revoke Technisand's sand dune mining permit based on a finding that Technisand failed to satisfy a specific provision of the SDMA that was unrelated to the question whether Technisand's conduct would pollute, impair, or destroy natural resources. In so doing, the Court of Appeals confused the concepts of "standard" and "process" and allowed the collateral revocation of an environmental permit long after the time for properly challenging its issuance had passed. If the Court of Appeals decision is affirmed, the result will (1) subvert the purpose of MEPA by allowing long-delayed collateral attacks on DEQ permit decisions rather than focusing on whether the defendant's conduct is likely to pollute, impair, or destroy natural resources, and (2) remove finality from environmental permits to the detriment of Michigan manufacturers and the State's economy.

Manufacturers and their suppliers frequently conduct activities authorized by environmental permits. In such cases, their ability to confidently rely on the finality of the environmental permit is of utmost importance. The Court of Appeals' holding provides a vehicle for private citizens to challenge environmental permits collaterally long after they had otherwise become final. This expansive view of MEPA is not supported by its statutory language. Although the language of MEPA allows citizens, in certain circumstances, to sue to enjoin

conduct that will pollute, impair, or destroy natural resources, it does not provide an avenue for citizens to invalidate issued permits based solely on alleged flaws in the permit process. The Court of Appeals' decision to the contrary is a matter of critical concern to the MMA, because manufacturers frequently undertake operations, and make substantial capital expenditures, in reliance on the finality of environmental permits that are essential to doing business in this state.

B. ***Overview of MEPA***

MEPA provides a statutory vehicle for Michigan citizens to sue for declaratory and other equitable relief to protect Michigan's natural resources from pollution, impairment or destruction. See, e.g., *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-305; 224 NW2d 883 (1975). To prevail on a MEPA claim, the plaintiff must first make a "prima facie showing that the *conduct* of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." See *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 24; 576 NW2d 641 (1988), quoting MCL 324.1703 (emphasis added). The defendant may rebut the plaintiff's prima facie case with "evidence to the contrary," or by showing, as an affirmative defense, "that there is no feasible and prudent alternative to defendant's *conduct* and that his or her *conduct* is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for protection of its natural resources . . . ."[1] MCL 324.1703(1) (emphasis added). Accordingly, MEPA's sole focus is on the effect of a defendant's *conduct* and its effect or likely effect on natural resources.

There is no specific standard for measuring whether a defendant's conduct has, or will likely, pollute, impair, or destroy natural resources. *Nemeth*, *supra* at 30. Rather, "each alleged

[1] The rebuttal and affirmative defense provisions of MEPA serve to weed out "frivolous claims." *Nemeth, supra* at 36 n 10.

MEPA violation must be evaluated by the trial court using the pollution control standard appropriate to the particular alleged violation." *Id.* at 35. Depending on the facts of the case, if the Legislature (or some other state body) has already articulated an applicable pollution control standard, then the court may use the legislative standard to assess whether the defendant's conduct has, or will likely, pollute, impair, or destroy natural resources—provided that the adopted standard is determined to be "valid, applicable, and reasonable in accordance with the courts' development of the common law of environmental quality." *Id.*

The operative statutory section is § 1701, which refers to standards for pollution or for antipollution devices or procedures:

> (1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.
>
> (2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:
>
> (a) Determine the validity, applicability, and reasonableness of the standard.
>
> (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court. [MCL 324.1701.]

Thus, "[w]here the purpose of the statute used as a pollution control standard is to protect our natural resources or to prevent pollution and environmental degradation, a violation of such a statute can establish a prima facie case under the MEPA." *Nemeth, supra* at 36. On the other hand, where no appropriate legislative standard exists, MEPA empowers the courts to determine whether there is, or will be, an adverse environmental effect and to take appropriate measures. See *Nemeth, supra* at 30-31. In *all* MEPA cases, regardless of whether the court ultimately

decides to adopt a legislative standard, the essential question before the court is whether conduct does, or is likely to, pollute, impair, or destroy natural resources. See, e.g., *Nemeth*, *supra* at 32, quoting *West Michigan Environmental Action Counsel v Natural Resources Comm'n*, 405 Mich 741, 760; 275 NW2d 538 (1978) (explaining that "[t]he real question before us is when does such impact rise to the level of impairment or destruction?").

C. *The SDMA Permit Application Process*

In this case, the Court of Appeals adopted § 63702 of the SDMA as the pollution control standard by which to measure Technisand's conduct. See *Preserve the Dunes, Inc v Department of Environmental Quality*, 253 Mich App 263, 290-291; 655 NW2d 263 (2002), slip op p 14 (explaining that "when a statute exists that regulates an activity via particular standards and procedures, including those involving eligibility for permits, that statute 'fills in the blank' to provide the standard for review under MEPA"). Although MMA is not directly concerned with the rules regarding eligibility for sand dune mining permits under the SDMA, an understanding of the SDMA permit application process is necessary to appreciate the ramifications of the Court of Appeals' decision.

Under § 63702 of the SDMA, a party seeking to acquire a sand dune mining permit for mining within a "critical dune area" must fall within one of two specific categories, each relating to the amendment of an existing permit:

> (1) Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances:
>
> (a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.
>
> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989

> the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.
>
> (2) As used in this section, "adjacent" means land that is contiguous with the land for which the operator holds a sand dune mining permit issued pursuant to section 63704, provided no land or space, including a highway or road right-of-way, exists between the property on which sand dune mining is authorized and the adjacent land. [MCL 324.63702.]

In short, whether a party is initially eligible to acquire a permit to mine in a "critical dune area" depends on whether the operator either seeks to renew an existing permit for the same area or is the holder of a permit seeking to mine an adjacent area. Thus, on its face, § 63702 does *not* discriminate based on the likelihood that the applicant's conduct will pollute, impair, or destroy natural resources. Rather, what is relevant under § 63702 are the circumstances surrounding the applicant's past association with the property in question.

In addition to satisfying § 63702, an applicant for a sand dune mining permit must prepare an environmental impact statement under § 63705, a progressive cell-unit mining reclamation plan under § 63706, and a 15-year mining plan under § 63707. Unlike the eligibility requirements of § 63702, upon which the Court of Appeals exclusively relied, the specific requirements of § 63705 through § 63707 *are* directly related to the effect that defendant's specific proposed conduct could have on natural resources. In the environmental impact statement, the applicant must specifically address, among other things, (1) the impact that the proposed mining operation will have on flora and fauna, groundwater, surface resources, and surrounding air quality, (2) alternatives to the selected location, and (3) a description of the existing environment in the location. See MCL 324.63706. Likewise, in the reclamation plan, the applicant must explain, in detail, the applicant's intended plan for mining the area. See MCL 324.63707(1). Only if the plan meets a detailed list of specific requirements may it be approved

by the DEQ. See MCL 324.63707(2) & (3). Though less detailed, the required 15-year plan also focuses on the applicant's specific plans for the property.

For purposes of protecting sand dunes from pollution, impairment, or destruction, the key statutory section is *not* § 63702, but § 63709, which provides:

> The department shall deny a sand dune mining permit if, upon review of the environmental impact statement, it determines that the proposed sand dune mining activity is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, as provided by [MEPA]. [MCL 324.63709.]

In other words, the DEQ is expressly directed to use the same broad standard set forth in § 1701(1) of MEPA to determine whether a permit should issue. In this case, because the DEQ issued the permit to Technisand, it necessarily determined, *based on the environmental impact statement*, that the contemplated sand dune mining activity would *not* "pollute, impair, or destroy the air, water, or other natural resources" under § 63709.

D. *The provision of the SDMA relied upon by the Court of Appeals is not an appropriate "standard" for application under the MEPA.*

The Court of Appeals erred in adopting § 63702 of the SDMA—which defines the eligibility requirements for a sand dune mining permit—as the "standard" for assessing whether TechniSand's conduct would violate MEPA. Under the guise of adopting a legislatively-created standard, the Court of Appeals' analysis has effectively transformed MEPA into a vehicle by which persons may collaterally challenge environmental permits on grounds unrelated to the purpose of MEPA and long after the permit process is final and no longer subject to appeal. The Court of Appeals' decision also shifts the focus of MEPA away from the effect of a defendant's conduct on natural resources.

Prohibiting certain conduct by a permitee on the ground that the conduct has harmed, or will harm, the environment (which is clearly sanctioned by the plain language of MEPA) is

different from invalidating a permit based on an alleged error in the permit application process (which is what the Court of Appeals did here). The rules for obtaining an environmental permit are not necessarily related to the anticipated effect of the regulated activity on natural resources. Unfortunately, the Court of Appeals' holding opens the door for persons to sue to stop regulated activity based on alleged errors in the permit application process—which, depending on the circumstances, may or may not be relevant to environmental concerns—without any consideration of whether the defendant's conduct will pollute, impair, or destroy natural resources.

In this case, the Court of Appeals was not in a position to consider the "environmental impact statement" submitted by Technisand pursuant to § 63705. Nor did it expressly consider—as required by *both* MEPA and § 63709—whether Technisand's planned mining activity would "pollute, impair, or destroy the air, water, or other natural resources." Instead, the Court of Appeals simply concluded that Preserve the Dunes was entitled to summary disposition based solely on its finding that Technisand did not qualify as an eligible permit applicant under § 63702. Of all the sections of the SDMA, § 63702 is perhaps *least* relevant to the question whether a permit applicant's intended conduct is likely to harm the environment. Unlike § 63709, which specifically directs the DEQ to deny a sand dune mining permit if the proposed activity is "likely to pollute, impair, or destroy the environment," § 63702 is concerned only with the circumstances surrounding the applicant's past association with the property in question. By using this one alleged violation of the SDMA (§ 63702), without conducting any review—de novo or otherwise—of the DEQ's analysis of the environmental impact question under § 63709, the Court of Appeals circumvented the very purpose of MEPA, which is to ensure that natural resources are appropriately protected from harm. Simply stated, MEPA does *not* give citizens an

unfettered right to collaterally attack environmental permitting decisions made by the DEQ based on alleged flaws in the permit application process that are unrelated to whether the defendant's conduct is likely to pollute, impair, or destroy natural resources.

Section 63702, standing alone, does not function as an appropriate "standard" by which to measure the likely effect of a permit applicant's conduct on natural resources. This is made clear by the fact that sections of the SDMA *other than* § 63702 specifically address the "environmental impact" of the proposed mining activities (§ 63705) and expressly require the DEQ to determine whether such activities will likely "pollute, impair, or destroy natural resources" (§ 63709). These other sections do not fix a "standard" that is any different from the general MEPA standard set forth in § 1701(1). Instead, § 63709 of the SDMA *expressly incorporates* the general MEPA standard by requiring the DEQ to determine whether the proposed mining activity is likely to pollute, impair, or destroy natural resources "as provided by part 17 [*i.e.,* MEPA]." Because the standard used by the DEQ to evaluate the environmental impact of sand dune mining permits is the same test used to establish a prima facie case under Subsection 1701(1) of MEPA, no purpose can be served by "adopting" the SDMA standard for application in a MEPA case. By focusing solely on § 63702 of the SDMA, the Court of Appeals thwarted the purpose of MEPA. Instead of considering the question whether Technisand's conduct would likely pollute, impair, or destroy natural resources, as required by § 1701 and § 63709, the Court of Appeals was left to consider only the unrelated question whether Technisand qualified as an "operator" at the appropriate time.

The Court of Appeals' misunderstanding of the purpose of MEPA is demonstrated by its criticism of the trial court's focus on whether Technisand's conduct would likely pollute, impair, or destroy natural resources:

> Judge Schofield's ruling resulted in consideration *only* of whether the proposed mining is likely to impair or destroy the natural resource and did not consider whether the DEQ properly granted the amended permit. [*Preserve the Dunes*, *supra* at 293, slip op p 15 (emphasis added).]

Because the paramount question under MEPA is precisely whether the defendant's conduct is likely to pollute, impair, or destroy natural resources, the Court of Appeals' criticism of Judge Schofield's ruling actually reveals the merit of his ruling. The Court of Appeals, on the other hand, by concluding that the question of "whether the DEQ properly granted the amended permit" was necessary, and somehow *different* than the question of whether TechniSand's conduct was likely to pollute, impair, or destroy natural resources, has inadvertently demonstrated that its analysis of the permit application process was broader than permitted under MEPA. The very point of MEPA is to protect natural resources from conduct that is likely to harm natural resources—not to otherwise serve as a basis for invalidating an issued permit. A test that would allow a party to prove a MEPA violation on *any other* basis is contrary to the purpose and language of MEPA.

The Court of Appeals' error may have occurred because the panel confused two distinct concepts: (1) the *procedure* for obtaining an environmental permit, and (2) the *standard* for assessing the defendant's conduct under the permit. To determine whether a MEPA violation has occurred, a court may consider a legislatively fixed "*standard* for pollution or an antipollution device or procedure." MCL 324.1701(2) (emphasis added). The word "standard" suggests "something established as a rule or basis for comparison in measuring or judging capacity, quantity, content, extent, value, quality, etc." See *Webster's New World College Dictionary* (4th ed.), p 1396. Thus, a "standard" for an "antipollution procedure" might, for example, refer to best management practices necessary to minimize pollutant discharges to an acceptable level.

Despite the fact that MEPA provides only for application of a "standard," the Court of Appeals repeatedly referred to MEPA as requiring the application of a "standard *or procedure*." See *Preserve the Dunes, supra* at 274, 283, 285, 290, 293, 304 (slip op pp 5, 10-11, 14-15, 20). A "standard" for assessing whether the defendant's conduct meets (or will meet) a certain requirement is not the same thing as the "process" by which one may obtain a permit to engage in such conduct—especially where the permit "process" includes components unrelated to the nature of the defendant's contemplated conduct, such as § 63702. By combining the concepts of "standard" and "process," and then finding a MEPA violation based on an alleged flaw in the permit "process," the Court of Appeals lost sight of MEPA's requirement that the effect of the defendant's "conduct" be assessed against a "standard."

The Court of Appeals' confusion of these concepts is demonstrated by the following excerpt:

> It is unclear how MCL 324.63702, which expressly provides the procedure for the DEQ to regulate mining specifically in critical dune areas, could be construed as anything but the appropriate '*procedure*' for allowing mining in critical dune areas. See *Preserve the Dunes, supra* at 283 (slip op p 10) (emphasis added).

While § 63702 might be a *part* of the appropriate "procedure," it does not establish a standard for measuring the likely effect of defendant's conduct on natural resources, which is essential to obtaining relief under MEPA. Therefore, the Court of Appeals' sole reliance on § 63702 was error.

E. *Preserve the Dunes' claim seeking to invalidate the sand dune mining permit based on Technisand's alleged failure to comply with the provisions of the SDMA is time-barred.*

MEPA provides an avenue for citizens to be heard regarding the permit process, but that process was not followed here. Under Subsection 1705(1), a person may "intervene as a party" in an "administrative, licensing, or other" proceeding or in the "judicial review" of such a

proceeding for the purpose of "filing a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources." See MCL 324.1705(1). Obviously, such intervention can only occur while the proceedings are taking place. After that time, the plain language of the MEPA limits a person to bringing an action for equitable relief based on the effect, or likely effect, of the defendant's "conduct." See MCL 324.1703(1). As demonstrated above, an objection to the effect of the defendant's conduct cannot be based exclusively on the defendant's compliance with the requirements for securing an environmental permit without considering the paramount question whether the defendant's conduct will actually pollute, impair, or destroy natural resources.

Under Subsection 63708(5) of the SDMA, the DEQ is required to "provide a list of all pending sand dune mining applications" upon a request by any person. Thus, Preserve the Dunes, or any other person or organization concerned about sand dunes, could have learned of Technisand's pending application by requesting a list of applicants from the DEQ. Indeed, as noted in Technisand's brief, "one or more persons who are now members of Preserve the Dunes, Inc., attended one or more of the public hearings conducted by the Michigan Department of Environmental Quality with respect to the application for amended permit which resulted in issuance of the permit to Technisand on November 25, 1996." (See Plaintiff's Responses to Technisand's Request to Admit). Upon learning of Technisand's application, members of Preserve the Dunes could have intervened as parties in the permit application process and filed a pleading addressing the question whether Technisand's proposed sand dune mining activities would harm the environment in violation of MEPA and § 63709 of the SDMA. If successful, the

intervenors would be able to prevent the issuance of the permit. If unsuccessful, the intervenors would be entitled to file an appeal as of right in the circuit court.

If the sand dune mining application process is governed by the provisions of the Administrative Procedures Act, MCL 24.201 *et seq.*("APA"), as Technisand contends, a party intervening in the permit application process would have had 60 days within which to petition for judicial review. MCL 24.304(1). Even if the sand dune mining application process is not subject to the provisions of the APA, a right to judicial review would exist under Const 1963, Art 6, § 28, which guarantees the right to appeal from all "judicial or quasi-judicial agency decisions that affect private rights or licenses," and MCL 600.631, which provides that the circuit court has jurisdiction over appeals from agency decisions where a right to appeal has not been otherwise created by law. If the right to appeal existed under MCL 600.631 rather than the APA, then the intervenors would have had 21 days within which to file an appeal. See MCR 7.104(A) and MCR 7.101(B)(1). The members of Preserve the Dunes failed to intervene in the permit proceeding or to file a petition for review within these time frames.

Using this process, any private citizen has an opportunity to protest the issuance of a sand dune mining license and obtain judicial review of the DEQ's decision to issue a sand dune mining license. The requirement that interested persons request a list of pending applications from the DEQ to learn of permit application proceedings undoubtedly places a slight burden on those wishing to challenge the issuance sand dune mining permits. MMA asserts, however, that this burden pales in comparison to the burden that would be placed on manufacturers and other permitees if environmental permits were forever subject to challenge and revocation based on alleged flaws in the permit application process.

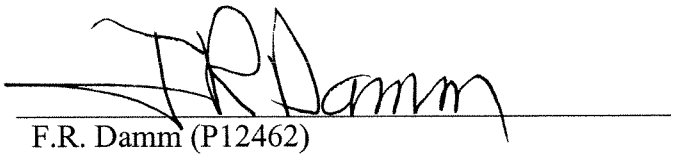
In sum, to the extent that Preserve the Dunes' challenge is directed toward the DEQ's issuance of the sand dune mining permit to Technisand (and not toward the effect of Technisand's conduct under the permit), it is untimely. The permit application was final and no longer subject to challenge on appeal when the time for a direct appeal under either the APA (60 days) or MCL 600.631 (21 days) passed.

CONCLUSION

MEPA was intended to be a vehicle to allow private parties to stop conduct that would pollute, impair, or destroy natural resources. The Court of Appeals' opinion marks a judicial expansion of MEPA liability by allowing private citizens to use MEPA as a vehicle to collaterally attack the validity of environmental permits—long after the permits have issued—based on alleged errors in the permit application process, without even considering whether the defendant's conduct would pollute, impair, or destroy natural resources. This improper expansion of MEPA undermines the finality of the hundreds, if not thousands, of environmental permits that are issued to Michigan-based manufacturers and are essential to doing business in this state. Because the Court of Appeals' opinion has created a new "back door" for challenging environmental permits that was not intended by the Legislature, MMA requests that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

Clark Hill PLC

By: 

F.R. Damm (P12462)
Peter D. Homes (P41000)
Paul C. Smith (P55608)
Attorneys for Amicus Curiae Michigan Manufacturers Association
500 Woodward Ave., Ste. 3500
Detroit, MI 48226
(313) 965-8300

Date: May 19, 2003